reme Court, U.S.
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No.

In the Supreme Court of the United States

ARTHUR C. VYSE,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Does the Warrant Clause of the Fourth Amendment apply to the taking and analysis by police of blood samples from suspects to determine the person's DNA?

PARTIES TO THE PROCEEDINGS

The parties are:

Arthur C. Vyse, petitioner to this Court and defendant in the state court proceedings. Mr. Vyse is an individual without corporate affiliation.

The State Of Wisconsin, respondent in this Court and the plaintiff in the state court proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, ARTHUR C. VYSE, respectfully prays that a writ of *certiorari* issue to review the judgment of the Wisconsin Supreme Court entered in *State of Wisconsin v. Arthur C. Vyse*, appeal no. 01-3225-CR, on November 12, 2002, by which that Court denied review of the opinion of the Wisconsin Court of Appeals, District IV in that appeal, and to review the opinion of the Wisconsin Court of Appeals, District IV, in the appeal, which decision affirmed the order of the circuit court for Dane County in State of Wisconsin v. Vyse, case number 98 CF 2400, denying petitioner's Motion for New Trial.

OPINION BELOW

The order denying review issued by the Wisconsin Supreme Court in *State of Wisconsin v. Arthur C. Vyse*, appeal no. 01-3225-CR, is not published. The opinion of the Wisconsin Court of Appeals in *State of Wisconsin v. Arthur C. Vyse*, appeal no. 01-3225-CR, is not published.

JURISDICTION

The date on which the highest state court decided this case was November 12, 2002. A copy of that order appears in the Appendix to this Petition.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Wisconsin statute section 940.225(2)(d):

> Wis. Stat. section 940.225(2) Second Degree Sexual Assault. Whoever does any of the following is guilty of a Class BC felony: (d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

STATEMENT OF THE CASE

Petitioner, ARTHUR C. VYSE, was convicted in a Wisconsin State Court of the felony offense of sexual assault with an unconscious person, the offense occurring on October 11, 1998. The alleged assault was intercourse upon a woman who had passed out from drinking too much at a social gathering with the Petitioner and his wife.

Police arrested the Petitioner without a warrant on October 17, 1998, and immediately took him to a hospital, where a nurse drew blood samples from him. The Petitioner

fought this, but his physical resistance was overcome by the police, he was strapped to a gurney, and the blood samples were taken from him.

The police did not have a search warrant, either. Hence, there was no warrant authorizing the police seizure of the blood samples. The Petitioner did not consent to the taking.

The purpose of the police in seizing the blood samples was to get DNA evidence. The police wanted to have the blood samples drawn so that the blood could be analyzed for DNA and, they hoped, matched to the DNA in semen stains found in the victim's underwear.

DNA, of course is not "evanescent." It doesn't dissipate from the blood. It's there as long as the person is alive. There was, therefore, no exigency requiring immediate action by police to preserve this DNA evidence.

The blood samples were submitted by the police to the Wisconsin State Crime Laboratory, where an expert did an analysis to determine the DNA markers of the Petitioner's blood. This expert also examined the semen stains in the panties, and concluded that the DNA was identical. In other words, the expert concluded that the DNA matched and established that the semen stains in the underwear were from the Petitioner.

The Petitioner was represented at trial held in September of 1999 in the Circuit Court for Dane County, Wisconsin, by an appointed attorney. That attorney did not bring any challenge to the seizure of the blood samples, or to the analysis of the samples to produce the DNA evidence.

The appointed attorney also did not object to the admission of the expert's testimony at trial.

Prior to the Petitioner's arrest, the victim had talked to police for the first time on October 12th. She told police that she'd been at out with the Petitioner and his wife on October 10th, celebrating the homecoming of the University of Wisconsin football team. She'd said she'd had "a lot" to drink, and she'd been drinking at a number of bars, as well as a "tailgate" party. She'd been drinking mixed drinks, including tequila and old fashioneds, and also wine and beer. About midnight, after the three returned to the home of the Petitioner and his wife, the victim passed out. She woke up when some pizza arrived, but passed out again after a few bites. It was now after midnight, making the date October 11th.

The victim, who weighed in excess of 170 lbs., told police that she next awoke when the Petitioner was removing her shoes, socks and pants, as she lay on the living room sofa, where she'd passed out. She also remembered that she told him she was cold and that he put a blanket over her and tucked her into it.

According to the victim's statement to the police, she again awoke some time later and recalled her hand pushing the Petitioner away from her. About 3:00 a.m., the victim woke up again, and noticed that she was undressed from the waist down, including her underwear. She put on her pants, and went back to sleep. About 5:00 a.m., she again awoke. She went to the bathroom, and told police that she noticed that her underwear was inside out and had the stains of a bloody discharge.

She then went to work. At work, she encountered the Petitioner's wife. In two conversations, one at work and the second later by telephone, the Petitioner's wife suggested that the victim herself had probably taken off her underwear and then the underwear on inside out. She told the victim that Petitioner had done nothing to her.

The victim then claimed that the Petitioner had telephoned her immediately following the call with his wife. According to the victim, the Petitioner told her that if she were pregnant, that he would take care of it and pay for any pregnancy test. He said, "Even if I didn't do it, I would take care of it."

The police had a hospital perform a "sexual assault test" on the victim on October 12th, sometime the day after the alleged assault, and an examination by the Wisconsin State Crime Laboratory of the victim's panties confirmed the presence of seminal fluid on the panties and of spermatozoa and seminal fluid on the vaginal and cervical swabs taken from the victim.

Police detectives subsequently interviewed the Petitioner and he gave them a statement in which he confirmed that the victim had spent that night sleeping in the Petitioner's home.

In possession of this information, the police arrested the Petitioner, without any warrant.

As previously stated, police took the Petitioner immediately to a hospital, where blood was drawn from the defendant, without his consent and over his physical resistance, to be analyzed for its DNA content. No warrant

was obtained by police to seize the blood. Police did not secure any warrant to subsequently analyze the blood, either.

The DNA testimony which resulted from these seizures was the centerpiece of the State's case at jury trial.

The victim's trial testimony paralleled what she'd told police prior to the Petitioner's arrest. She admitted that she'd been passed out drunk on the Petitioner's sofa and claimed that the Petitioner was on top of her sometime in the early morning hours when she'd briefly come to. She testified that when she again "blacked out" the Petitioner was on top of her and her panties were down on her thigh. She testified, however, that she didn't feel anything. When she ultimately arose about 5:30 a.m., she testified that her underwear were inside out and had "bloody mucus" on them. The discharge was similar to what she'd experienced before when having sex in the week before her period.

She also testified that the Petitioner had talked to her by telephone on October 12th and offered to pay for a pregnancy test, told her that he didn't want this to get to the police, and that he hadn't done anything. She reported matters to the police only after all of this, after she went to the hospital for an examination and police responded.

The victim testified that she did not give consent to anyone to have intercourse with her on October 11th.

The Petitioner did not testify.

The State Crime Laboratory's DNA expert, however, did testify – called as the star witness by the prosecution.

The DNA expert described the scientific methodology of DNA analysis, as well as his credentials in forensic analysis of body fluids for DNA. The expert testified to determining the DNA "markers" from the Petitioner's blood and extracted from the semen stains located on the victim's panties. He testified that he analyzed for seven separate "markers" in this case. The results of his DNA testing of these materials was admitted into evidence, and he testified to those results. The "markers" revealed by testing the Petitioner's blood were identical to the "markers" determined by testing the semen stains on the victim's panties.

The prosecution's DNA expert also performed a statistical analysis, based on the DNA markers which his testing had revealed. Based on this statistical analysis, the expert testified that the chance of finding a person in the Caucasian population with the same exact DNA markers as the Petitioner would be one in 620,000, or that only two ten-thousandths of the population would have those DNA markers.

The jury convicted the defendant. He was initially placed on probation, but his probation was soon revoked[1] as a consequence of his refusal, after conviction, to admit to having committed the offense and he is presently incarcerated in the Wisconsin State Prisons.

[1] The State of Wisconsin twice sought to revoke Petitioner's probation because he refused to confess, after conviction, to the commission of the offense. The State asserted this was a failure to cooperate in "treatment" mandated as a condition of probation. The State eventually succeeded in revoking Petitioner's probation for not answering a question put to him by his probation officer concerning his payment of fees associated with probation, information which the probation officer already knew.

In motions brought after the trial, Petitioner challenged the conviction, contending that his trial attorney had rendered ineffective assistance of counsel because she'd failed to move to suppress, or otherwise challenge, the warrantless seizure of the blood samples and the admission of the resulting DNA evidence in his trial. At a hearing held on this challenge, Petitioner's trial counsel asserted that she'd not brought a motion to suppress because she believed the State would simply then get a warrant and seize new blood samples from the Petitioner, yielding the same DNA evidence as it had earlier obtained by the warrantless blood seizure and analysis.

The trial and appellate courts in Wisconsin agreed with that view, concluding that the Petitioner had not been prejudiced by the attorney's omission. The Wisconsin Court of Appeals, in so holding, declined to decide whether a warrant was Constitutionally required to seize the blood samples, instead holding that the Petitioner had failed to establish prejudice from his attorney's actions, even if the police had violated the Constitution in seizing the blood without any sort of warrant.

The Wisconsin Supreme Court denied review, thereby eliminating the last opportunity for state court review of the Petitioner's conviction and setting the stage for his filing of this petition for writ of *certiorari*.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECLARE THAT WARRANTS ARE ORDINARILY REQUIRED BEFORE POLICED MAY SEIZE BLOOD SAMPLES.

This Court has twice in the past fifty years addressed the role of the Fourth Amendment in the seizure by the government of samples of one's blood. In *Schmerber v. California*, 384 U.S. 757 (1966), this Court held that the "exigent circumstances" exception to the Warrant Clause allowed police to seize blood samples after a drunk driving arrest because the alcohol evidence within the blood was "evanescent" and would be eliminated by the body from the blood before a search warrant could be obtained utilizing the process ordinarily employed in the 1960's, before the advent of photocopies, fax machines, cellular telephones, and legal rules allowing search warrants to be issued by telephone. In *Skinner v. Railway Labor Executive's Association*, 489 U.S. 602 (1989), this Court held that the "administrative search" exception to the Warrant Clause allowed government officials to obtain blood samples following a railway accident, where the purpose of the government was *not* criminal prosecution and the administrative rules established clear criteria by which to determine the justification for the search.

These cases, though each upheld government seizure without a warrant, each represent an exception to the Warrant Clause requirement that police obtain warrants before conducting searches and seizures of the person. These cases, moreover, each recognized that police seizure of blood samples from a person is a search and, as such, is governed by the provisions of the Fourth Amendment, and of the

Fourteenth Amendment when the search is performed by state officials.

In the present case, though, the police seized blood from the Petitioner, using physical force to overcome his resistance, without the authorization of either an arrest warrant or a search warrant. Because they were motivated solely by a desire to gain evidence for purposes of criminal prosecution, the rationale of the "administrative search" doesn't apply. Because the evidence they sought couldn't disappear from the blood, for DNA evidence is inherent in the blood itself, there was no "exigency."

There was, therefore, no Constitutional justification for proceeding without obtaining a warrant.

Yet, police didn't get one and the Court of Appeals in Wisconsin is in sufficient doubt about this matter that it declined to directly decide the point. This suggests that law enforcement has come to view the *Schmerber* opinion as excusing the warrant procedure whenever blood is the object of the search. The opposite is really the case, for the rationale of *Schmerber* – exigency in the face of the body's ability to eliminate alcohol from the blood – might not even justify the actions of police which that opinion countenanced, now that the streamlined processes for warrant issuance, such as telephonic warrants over cellular telephones, have significantly reduce the time it takes to secure a warrant. It is, therefore, a timely moment to reinforce the role of the Warrant Clause in blood draws and analyses.

II. THIS COURT SHOULD DECLARE THAT WARRANTS ARE REQUIRED BEFORE POLICE CAN ANALYZE BLOOD SAMPLES.

This Court's opinion in *Skinner* drew a very vital Constitutional distinction about blood tests. This Court observed that the seizure of the blood intruded upon the individual's interest in bodily integrity, an interest which the Fourth Amendment clearly protects. But the Court also held that the analysis of the blood itself infringes yet another Fourth Amendment interest: the privacy interest.

This Court was being prescient when it drew this distinction. Though this Court's opinion in *Skinner* remarks upon the many items of information which science at the time could find through blood analysis, the scope of the Government's ability to catalog the person and ascertain information about his or her personal life is today far greater than it was even thirteen years ago, when *Skinner* was decided.

Largely, the far more awesome levels of information which the government can now secure by analysis of the blood are a consequence of the development of the DNA technology which was the central feature of the Petitioner's trial.

In *Skinner*, this Court said:

> We have long recognized that a 'compelled intrusion into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search. In light of our society's concern for the security of one's person, it is obvious that this physical

> intrusion, penetrating beneath the skin, infringes the expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.

Id., 489 U.S. 616-17.

From this, the *Skinner* court held that "the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches." That holding clearly establishes that it is not just the collection of the blood samples which implicates the Fourth Amendment, but that the subsequent analysis of those samples does, as well.

In the present case, it was not the mere collection of the blood samples which violated the Constitution. The analysis of the samples was a further Constitutional violation. It was that analysis, moreover, conducted without a warrant, which yielded the DNA marker evidence used to such devastating effect in the Petitioner's jury trial. It was the ability of the State to establish that only one in 620,000 people would have the DNA markers of the Petitioner which so compellingly established that he must have been the source of the matching DNA markers found by analysis of the semen stains in the victim's undergarment.

The distinction which this Court drew in *Skinner* has, however, been largely ignored. Certainly, it was ignored by the Petitioner's trial counsel. It was also ignored by the state courts, each of which focused on the blood draw as though that draw and the subsequent analysis were but one unitary event.

The distinction which this Court recognized in *Skinner* deserves to be reemphasized, in the most strident possible terms. Technology today allows police to intrude far more deeply into the privacy of an individual by analysis of the person's blood than the Court which decided *Skinner* could have imagined. No doubt, the future will bring even more scientific capabilities and, with them, even greater avenues for intrusion into personal privacy by the analysis of bodily substances.

There must, therefore, be a clearly articulated rule, one which dogmatically establishes that the police authority to seize blood is not an authority to analyze it. This principle is not new. In both *United States v. Jacobsen*, 466 U.S. 108 (1984), and *Walter v. United States*, 447 U.S. 649 (1980), this Court recognized that the police power to seize without a warrant does not imply the power to search without a warrant, particularly when the inspection of that which has been seized involves subjecting the object to probing inspection or analysis.

That principle, however, is one which has been ignored when the topic is blood testing. In Wisconsin, the appellate courts have several times held within the past two years that the legal authority to seize blood carries with it the power to analyze the blood, with no further legal authority required than the justification for the initial seizure. See: *State v. VanLaarhoven,* 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411 (Wis. App. 2001); *State v. Wintlend,* 2002 WI App 314; *Village of Little Chute v. Walitalo*, 2002 WI App 211, 256 Wis. 2d 1032, 650 N.W.2d 891 (Wis. App. 2002). Though these opinions have been issued in drunk driving cases, where the testing is customarily restricted to analysis for alcohol content, the legal assumption that whatever is seized is then, without any further judicial

authorization, fair game for testing opens the door to far more intrusive analyses. The refusal to recognize that analysis of blood is itself a search regulated by the Fourth Amendment and distinct from the seizure of the blood samples opens the door to government analysis of blood samples to discern the most private information, including the DNA of the individual from whom the samples are drawn.

III. THE STATE COURTS IMPROPERLY IGNORED THESE ISSUES BY FINDING NO PREJUDICE, WHEN THE PREJUDICE WAS OBVIOUS FROM THE CONVICTION.

In the guise of finding that Petitioner's didn't suffer ineffective assistance of his trial counsel because he didn't suffer prejudice, the state courts have invented in this case a new exception to the exclusionary rule.

The blunt reality is that the conviction in this case rests on evidence seized without a warrant and then analyzed, i.e., searched without a warrant, all of which was the source of the expert testimony which the State used a trial to prove the Petitioner guilty. That evidence wasn't challenged at any time by the Petitioner's counsel, despite the basic and fundamental rule of the Fourth Amendment that all searches and seizures require a warrant, subject to the few and narrowly defined exceptions which this Court alone is empowered to craft. *Knowles v. Iowa*, 525 U.S. 113 (1998).

No exception to the Warrant Clause applied to this case, and the state courts offered none is upholding this conviction. This is not a case of "inevitable discovery." The police did not, at any time pursue any course of investigation which would inevitably have led by lawful means to the DNA evidence. They certainly did not have such an investigation

ongoing at the time the blood was seized. Yet, both are criteria upon which the application of the "inevitable discovery" doctrine rests, see: *Nix v. Williams*, 467 U.S.431 (1984), largely to prevent exactly the 'affirmance by assumption' upon which the state courts have relied in the present case.

Nor is this a case of "independent source." That evidence allows evidence which has actually been lawfully seized to be used as evidence, despite the fact that the evidence had earlier been unlawfully discovered, provided that police actually employ a lawful and untainted avenue of investigation to locate and lawfully seize the evidence used at trial. *Murray v. United States*, 487 U.S. 533 (1988). In the present case, in contract, the police have not used lawful means to discover the DNA evidence, and the evidence actually employed to secure the conviction was the evidence obtained in violation of the Fourth Amendment.

The state court's conclusion that there was no prejudice to the Petitioner arising from his counsel's failure to challenge this evidence, then, cannot rest on the belief that the evidence was lawfully seized without a warrant pursuant to any recognized exception to the Warrant Clause or that any recognized exception to the Warrant Clause excused the Constitutional violation. If, as is the legal reality, there was no legal basis upon which a challenge to the evidence could have been rejected, it is folly to characterize the failure to challenge it as non-prejudicial. The conviction rests on that evidence.

Rather, the affirmance of the Petitioner's conviction by the Wisconsin courts rests on expanding the concept of "prejudice" to include assumptions about what the police might have done, rather than proof of what they did do. As

already demonstrated, this is improper when analyzing the admissibility of this evidence directly under the Fourth Amendment. There is no reason that a different concept of prejudice ought to apply when, due to counsel's omissions, that same legal issue ends up being addressed under the Sixth Amendment, as well as the Fourth.

CONCLUSION

Today's technology is vastly different than that which existed in 1966, when *Schmerber v. California* was decided. That future which was merely a hint in this Court's opinion in *Skinner v. Railway Labor Executive's Association* has arrived, bring with it the technology to intrude into personal privacy through a "blood test" in ways never contemplated in past decisions of this Court.

This technology now gives deeper meaning to the separate Fourth Amendment interests which this Court recognized in *Skinner,* because the technological ability to intrude on personal privacy through the analysis of one's blood is now so much greater. The importance of asserting the proper role of the judiciary in this process is not merely compelling, but basic to the fundamental purpose of the Fourth Amendment, the promise that judges, not police officers, will determine what is to be searched and for what the police may search.

This Court, therefore, should accept review of this case to decide and establish the role of the Courts under the Warrant Clause when police seek to seize blood and, thereafter, when they desire to have that blood analyzed in order to secure evidence to be used to prosecute the person whose blood was seized. This Court should use this case to hold that the obligation to secure a warrant before blood

analysis can be accomplished is established within the Warrant Clause of the Fourth Amendment.

Respectfully submitted,

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APPENDIX A

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November 12, 2002

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You are hereby notified that the Court has entered the following order:

No. 01-3225-CR State v. Vyse L.C.#98CF2400

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Arthur C. Vyse, Jr., and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Abrahamson, C.J., dissents.

Cornelia G. Clark
Clerk of Supreme Court

APPENDIX B

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July 30, 2002

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You are hereby notified that the Court has entered the following opinion and order:

01-3225-CR State of Wisconsin v. Arthur C. Vyse, Jr. (L.C. #98-CF-2400)

Before Vergeront, P,J., Dykman and Lundsten, JJ.

Arthur Vyse appeals a judgment convicting him of second-degree sexual assault of an unconscious victim and an order denying his motion for postconviction relief Based upon our review of the briefs and record, we conclude at conference that this ease is appropriate for summary affirmance under WIS. STAT. RULE 809.21 (1999-2000).

The sole issue on appeal is whether Vyse was denied effective assistance of counsel by his attorney's failure to move to suppress critical DNA, evidence and testimony regarding Vyse's resistance to giving the evidence. The State concedes, and we therefore assume for the purpose of this appeal, that the DNA evidence was illegally obtained by a warrantless blood draw taken without Vyse's consent shortly after his arrest.

To establish denial of the constitutional right to effective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). On review we accept the trial court's findings of fact unless they are clearly erroneous, but questions of whether counsel's performance was deficient and prejudicial are questions of law, which we review de novo. *State v. Pitsch,* 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

The trial court found that counsel was aware of the potential challenge to the DNA evidence, and deliberately decided not to pursue the issue because Vyse was urging a speedy resolution of the case, and counsel believed that the State would be able to obtain a warrant to gather the same evidence again, which would be admissible under the inevitable discovery rule, if the initial test results were suppressed. The trial court's factual findings regarding counsel's strategy were supported by testimony at the postconviction hearing and are not clearly erroneous.

We agree with the trial court's conclusion that counsel's expressed strategy fell within appropriate norms of professional representation, and that Vyse cannot demonstrate prejudice given that a successful suppression motion would only have prompted a second, legal blood draw. Ultimately, the DNA evidence would have come in, and we see no reasonable probability that Vyse would not have been convicted based upon it, even if the jury were not aware that Vyse had resisted giving a blood sample.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21.

Cornelia G. Clark
Clerk of Court of Appeals

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT, Branch 11
DANE COUNTY

Case No. 9S CF 2400

[Filed November 9, 2001]

STATE OF WISCONSIN,	)
Plaintiff,	)
	)
vs.	)
	)
ARTHUR C VYSE, JR.,	)
Defendant.	)
	)

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

The sole remaining issue on defendant's motion for a new trial is whether defendant's counsel was ineffective because she did not file a motion to suppress the results of a DNA test taken from blood drawn from defendant following his arrest in this matter.

At the time of the arrest the defendant was handcuffed and taken to a hospital for a blood draw about 20 minutes after arrest. Law enforcement had panties worn by the victim

of the alleged sexual assault and had probable cause to believe that the defendant had deposited DNA on the panties.

The prosecution has conceded that the blood was drawn from the defendant without consent. The prosecution argues that the blood draw was a search incident to arrest. The prosecution is wrong. The blood was not drawn for the safety of the arresting officers nor was there an exigent circumstance such as dissipation of evidence which might also permit a warrantless search. There is no evidence that the blood was drawn in an unreasonable manner.

The DNA evidence was important in the case. The trial defense attorney took over the case from the defendant's previous attorney. The switch in counsel was after the deadline for filing motions but trial counsel indicated she would have filed any motion she deemed appropriate after the deadline.

The defendant was a difficult client whose theories of defense kept changing. At various times the defendant said the sex was consensual, involved a threesome with his wife and never happened. He asked his trial counsel to create a theory for him. He was eager for a resolution of the case and did not want delay. He wanted a trial and a verdict.

Trial counsel was generally aware of the laws of search and seizure and was aware that there were issues which could lead to suppression of the DNA results. She was also aware, and correctly so, that there was more than enough evidence for the prosecution to get a search warrant for the taking of more blood if she was successful in suppressing the first DNA results. She balanced that with the knowledge that

the defendant did not want delays and decided not to file a suppression motion. She did not discuss this issue in detail with the defendant.

Trial counsel's decision was reasonable, rational and consistent with both the defendant's desires to move the case forward and reality. She also had concerns about the reaction of the prosecution if she successfully suppressed the DNA results knowing that eventually the evidence would be gathered anyway.

Different attorneys have different styles. The filing of every conceivable motion does not necessarily make an attorney effective nor does the careful deliberate and thoughtful strategy of only raising issues which benefit the client in the long run make someone ineffective. Both styles can be effective or ineffective depending on the circumstances just as raising or not raising every possible objection at trial can range from effective to counter-productive.

In summary, failing to raise the suppression issue knowing the defendant wanted to keep the case moving and knowing that the prosecution could obtain the evidence anyway did not prejudice the defendant and does not make trial counsel ineffective. Even if counsel should have filed a suppression motion, and this is debateable, the defendant was not prejudiced.

Defendant's motion for a new trial on this issue is denied.

Dated: November 9, 2001.

BY THE COURT:

/s/ _____
Daniel R. Moeser
Circuit Judge

ADA Paul Humphrey
Atty. Ralph Kalal